

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

**Supreme Court
No. 153324**

RODERICK LOUIS PIPPEN,

Defendant-Appellant.

**Court of Appeals No. 321487
Lower Court No. 10-006891-01**

**The People's Supplement to their Brief in Opposition to
Defendant's Application for Leave to Appeal
with Appendix A**

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Counterstatement of Question Involved

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy; furthermore, the failure to interview witnesses does not itself establish ineffective assistance of counsel unless it is shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefitted the defense. Defendant's trial counsel testified at the evidentiary hearing that he chose not to call Michael Hudson as a witness because his testimony would reinforce the fact that Defendant was in possession of the murder weapon 90 days after the murder; furthermore, Hudson had been previously convicted of five theft-related offenses, which could have been used to impeach his credibility, and he also told a ludicrous story about how he did not see Defendant discard what turned out to be the murder weapon when he (Hudson) was in close proximity to Defendant when he himself (Hudson) also discarded a gun, both guns being thrown under the same car. Has Defendant sustained his burden of establishing ineffective assistance of counsel due to trial counsel's "failure" to interview and call Hudson as a defense witness?

The People answer no.

Defendant answers yes.

The trial court answered no.

The Court of Appeals answered no.

Counterstatement of Facts

The People incorporate the facts set forth in their Brief in Opposition to Defendant's Application for Leave to Appeal.

Argument

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy; furthermore, the failure to interview witnesses does not itself establish ineffective assistance of counsel unless it is shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefitted the defense. Defendant's trial counsel testified at the evidentiary hearing that he chose not to call Michael Hudson as a witness because his testimony would reinforce the fact that Defendant was in possession of the murder weapon 90 days after the murder; furthermore, Hudson had been previously convicted of five theft-related offenses, which could have been used to impeach his credibility, and he also told a ludicrous story about how he did not see Defendant discard what turned out to be the murder weapon when he (Hudson) was in close proximity to Defendant when he himself (Hudson) also discarded a gun, both guns being thrown under the same car. Defendant has not sustained his burden of establishing ineffective assistance of counsel due to trial counsel's "failure" to interview and call Hudson as a defense witness.

This Court has directed the parties to file supplemental briefs on the question of whether the defendant was denied the effective assistance of counsel based on trial counsel's failure to adequately investigate and present testimony from a res gestae witness. The witness in question was Michael Hudson.

The first question is whether Michael Hudson was a res gestae witness.

A res gestae witness is "an eyewitness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *People v Hadley*, 67 Mich App 688, 690; 242 NW2d 32 (1976). In this case, Hudson was a disputed res gestae witness. If prosecution witness Sean McDuffie's testimony were to be believed, Hudson would have been a res gestae witness. In fact, according to McDuffie's testimony, Hudson was the driver of the vehicle that Defendant got away in after the shooting, and as such would have made him (Hudson) not only a res gestae witness, but

arguably an accomplice. But the People acknowledge that even as an accomplice, the prosecution would have still been required to list Hudson on the prosecution's witness list. See *People v Koonce*, 466 Mich 515; 643 NW2d 153 (2002). On the other hand, if Hudson's testimony at the evidentiary hearing were to be believed, he would not have been a res gestae witness because, according to his testimony, there never was a time that he was driving around with Defendant and McDuffie, where Defendant asked him to stop the car, after which Defendant got out of the car and shot somebody.

If the concern of this Court in framing the issue as it does, that is, of referring to Hudson as a res gestae witness, is whether Defendant's trial counsel had notice of Hudson's existence, every indication is that Defendant's trial counsel did have such notice.¹ Indeed, Defendant's trial counsel, Luther Glenn, testified at the postconviction evidentiary hearing that he was aware, from reading the preliminary examination transcript and McDuffie's testimony at an investigative subpoena proceeding, that McDuffie was saying that when he observed what he observed, Michael Hudson was also present.²

¹ The People are unsure at this juncture whether Hudson was listed on the prosecution's witness list, although, again, the People acknowledge that he should have been, even if the prosecution had viewed him as an accomplice.

² After a jury was selected, but before any witness was called, this colloquy occurred :

MR. REYNOLDS [Assistant Prosecutor]: Yes, your Honor. Just one matter to bring to the Court's attention. There is an individual who I believe our witness, Mr. McDuffie, will say was in the car with him and the defendant at the time of the killing. His name is Michael Hudson.

I am advised he is present today, and I will ask that there be a sequestration of any potential witnesses, including him, during the course of the

Defendant's claim, of course, is that his trial counsel's failure to interview Michael Hudson as a potential defense witness and call him as a witness at trial deprived him of the effective assistance of counsel entitling him to a new trial.

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), this Court explained that when evaluating a claim of ineffective assistance of counsel under either the Sixth Amendment to the United States Constitution or under the equivalent provision of the Michigan Constitution, Michigan

proceeding.

THE COURT: All right. What I will do is it is my practice to create an exception for the officer in charge. As well as anyone that Mr. Glenn may choose to have assist him, if any, during the course of the trial.

But anyone else who is expecting to be a witness, either on behalf of the prosecution or the defense, will have to step outside until such time as they have testified.

All right. And then after they have testified, they are allowed to remain in the courtroom. Okay.

MR. REYNOLDS: So I would ask the Court, Mr. Hudson, if he is here, to step out.

MR. GLENN [Defense Counsel]: He's not on the People's witness list. Not on my witness list. I don't know why we would expect him to testify.

THE COURT: Well, if he's not on either witness list, then he's not going to testify.

MR. REYNOLDS: Okay. Great.

(Jury Trial Transcript, 03/19/14, 3-4).

courts must examine the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); hence, this Court's citation to *Strickland* in its Order directing the parties to file supplemental briefs. In order to establish ineffective assistance of counsel under *Strickland*, the defendant must make two showings. First, he must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense.

1) The Deficient Performance Prong

Strickland also states that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 US at 690-691; 104 S Ct at 2066. It follows, then, that there is no per se rule that failure to interview witnesses constitutes ineffective assistance of counsel, but rather ineffective assistance of counsel cases turn on their individual facts. *Sanders v Trickey*, 875 F2d 205, 209 (CA 8, 1989). This is consistent with Michigan case law. See *People v Caballero*, 184 Mich App 636,642; 459 NW2d 80 (1999)) ("Even the failure to interview witnesses does not itself establish inadequate preparation. *People v Alcorta*, 147 Mich App 326; 383 NW2d 182 (1985), *lv den* 425 Mich 876 (1986). It must be shown that the failure resulted in counsel's ignorance of

valuable evidence which would have substantially benefitted the accused. *People v Johnson (After Remand)*, 125 Mich App 76; 336 NW2d 7 (1983).”).

Before *Strickland* was decided, the United States Court of Appeals for the District of Columbia (en banc) set forth this apt pronouncement in *United States v Decoster*, 199 US App DC 359; 624 F2d 196 (CA DC, 1976):

The duty to investigate is a subset of the overall duty of defense counsel. A conscientious defense attorney will naturally investigate possible defenses. As part of this process, witnesses who may have information relevant to the case should be identified and interviewed. However, any claim of ineffectiveness must turn not on abstractions as to duty, but on an appraisal of consequences.

And the development of the case before trial is an area of peculiar sensitivity in the attorney/client relationship.

Some failures to investigate may be so egregious as to command judicial correction without more. In *McQueen v Swenson*, [498 F2d 207 (CA 8, 1974), *on remand*, 560 F2d 959 (CA 8, 1977)], the defense counsel had adopted a blanket policy which he adhered to even in the face of requests by the defendant that certain persons be interviewed. This was held “an absurd and dangerous policy which can only be viewed as an abdication not an exercise of his professional judgment.” [*Id.*, at 498 F2d at 216]. Counsel’s defect was subject to a simple, workable remedy and thus was a proper subject for judicial intervention.

Most claims of failure to investigate will not involve such clearcut situations. They must be appraised in light of the information available to the attorney. A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person’s account is otherwise fairly known to defense counsel. This is the teaching of our 1974 *Clayborne* opinion. [*United States v Clayborne*, 166 U S App DC 140; 509 F2d 473 (1974)]. As Judge MacKinnon, joined by Judge

McGowan, and writing over Judge Bazelon's dissent, pointed out:
“(T)rial counsel had their own clients as sources of information.”
[*Id.*, 166 US App DC at 144; 509 F2d at 477].

199 US App DC at 372; 624 F2d at 209.³

In *DeCoster*, the Court observed that “[r]ealistically, a defense attorney develops his case in large part from information supplied by his client.” *Id.* That is not to say, however, that the client can be the only source of information upon which counsel can rely in determining whether to interview a particular witness or not. Indeed, “[a]n attorney’s decision not to interview witnesses and to rely on other sources of information, if made in the exercise of professional judgment, is not ineffective counsel.” *United States v Glick*, 710 F2d 639, 644 (CA 10, 1983), *cert den* 465 US 1005; 104 S Ct 995; 79 L Ed 2d 229 (1984).

In this case, the “other source of information” that Defendant’s trial counsel had was that Michael Hudson had been arrested with Defendant three months after the shooting incident, when an officer observed Hudson and Defendant each toss a firearm underneath the same car. According to the officer, it was Defendant who tossed the firearm that later turned out to be the murder weapon.

As the trial court noted at the evidentiary hearing on the claim of ineffective assistance of counsel, the fact of Defendant’s possession of the murder weapon even 90 days after the murder was rather compelling evidence of guilt. And as the Court of Appeals observed, defense counsel testified that he wanted to raise doubt about whether Hudson or Defendant actually had the weapon

³ Accord *Huffington v Nunn*, 140 F3d 572, 580 (CA 4, 1998), and the cases cited therein (“The Sixth Amendment, however, does not always compel counsel to undertake interviews and meetings with potential witnesses where counsel is familiar with the substance of their testimony.”).

that was later linked to the victim's murder, and he assumed that Hudson would be unwilling to say that he possessed the alleged murder weapon before tossing it under a car.

As to the first point noted by the Court of Appeals, that is, defense counsel wanting to raise a reasonable doubt about which of the two, Hudson or Defendant, threw the murder weapon, Defendant argues that there was no valid dispute about this because Defendant had already pled guilty to "possession of *the* firearm." (Italics added). The fact is, however, that when Defendant pled guilty, he never said what kind of firearm it was that he was in possession of on October 18, 2008 (a copy of Defendant's Plea Transcript is attached as **Appendix A**). The stipulation that the trial prosecutor and defense counsel entered into at the trial in this case also did not name a specific firearm, but was simply that "on January 27, 2009, Mr. Pippen admitted under oath to Honorable Daniel Ryan that [he] was in possession of *a* firearm on October 18th, 2008 in the area of Fairport and East Seven Mile Road in the City of Detroit." (Jury Trial Transcript, 03/17/14, 4). And finally, in opening statement, defense counsel said:

[MR. GLENN]: Now three months later, Mr. Pippen was in the company of Norman Clark and Michael Hudson when he was stopped, questioned, and arrested for some handguns that were recovered underneath a car. Three individuals were arrested, two handguns recovered.

Mr. Pippen admitted that he was in possession of one of the handguns, not the handgun that did the homicide, one of the handguns three months later.

(Jury Trial Transcript, 03/19/14, 41-42).

As to the second point noted by the Court of Appeals, that defense counsel assumed that Hudson would be unwilling to say that he possessed the alleged murder weapon before tossing it

under a car, the People are cognizant that in *Towns v Smith*, 395 F3d 251, 259 (CA 6, 2005) (the other case cited by this Court in its Order directing the parties to file supplemental briefs), trial counsel was deemed ineffective when he “made absolutely no attempt to communicate with [a potential alibi witness], despite requesting that [the witness] be kept in the county jail” to be interviewed before trial, and despite the petitioner's urging that the attorney contact the witness. 395 F3d at 259. In *Towns*, the Court concluded that “there [was] absolutely no support for the ... speculation that [the witness’s] testimony would have been damaging to [the] defense,” and that without having contact with the witness, “counsel ‘was ill equipped to assess [the witness’s] credibility or persuasiveness.’ ” *Id.*, 395 F3d at 259, 260. Here, unlike the situation in *Towns*, trial counsel did have actual support for his speculation that Hudson’s testimony would be damaging to Defendant, based on his valid assumption that Hudson would not put the murder weapon in his own hands, so that, by process of elimination, Defendant would have been the one in possession of the murder weapon.

Another logical reason for not interviewing or calling Hudson as a witness also stems from the gun-throwing incident, although this reason was not specifically expressed by trial counsel.⁴

⁴ The People do not feel it inappropriate to offer another reason for trial counsel’s decision which was not expressed by counsel inasmuch as that is what a reviewing court is supposed to do. Indeed, a court reviewing counsel’s performance “is required not simply to “give [the] attorneys the benefit of the doubt,” but to affirmatively entertain the range of possible “reasons counsel may have had for proceeding as they did.” *Cullen v Pinholster*, 563 US 170, 196; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011), quoting from *Pinholster v Ayers*, 590 F3d 651, 692 (CA 9, 2009) (Kozinski, CJ, dissenting). *Strickland* does, after all, “call for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind.” *Cullen*, *supra*, 563 US at 196; 131 S Ct at 1407.

The police officer who testified about the gun-throwing incident, Detroit Police Sergeant Eric Bucy, testified that he was working with three partners that day, in plainclothes in a semi-marked police vehicle, which had emergency lights in the interior. On that date, at around 1:00 a.m., he and his partners were on routine patrol, in the area of Fairport and East Seven Mile. At this time, in that area, he observed Defendant, who he identified in court, with two other individuals on the corner of Fairport and Seven Mile. Defendant was dressed in dark clothing at that time: a black hoodie, blue jeans shorts, a black hat, and he was wearing gloves. The other two people with Defendant were Michael Hudson and Norman Clark. Hudson was also dressed in dark clothing, wearing a black shirt, a black hoodie, black shoes, and black pants. These three individuals were just standing on the corner. At that location was Prince Pizza, which had been robbed a number of times. He observed Defendant look in their direction, and then, all of a sudden, Defendant turned to the right, and started walking east. Clark also looked in their direction. He also noticed in Defendant's waistband the butt of a handgun protruding through Defendant's sweatshirt. He notified his partners of what he had observed, and Officer Caldwell activated the interior lights, and they started following Defendant.

When he and his partners got to a position five feet behind Defendant, he saw both Defendant and Hudson step between two cars. He saw Defendant pull a handgun with a large magazine from his waistband, drop it to the ground, and kick it underneath one of the cars. Hudson pulled a .38 from his left pants pocket, dropped it to the ground, and kicked it under the same car that Defendant had kicked his gun under. Defendant then started walking in an eastbound direction, and Hudson started walking in the opposite direction. He and his partners then grabbed Defendant and Hudson, and he (the witness) grabbed Clark, who was closer to him.

Once all three individuals were secured, he recovered the weapons from underneath the car. He identified People's Exhibit No. 22 as the gun that he saw Defendant throw underneath the car: a Glock 9 millimeter, with a 30 round magazine containing 23 live rounds. He identified People's Exhibit No. 23 as a .380 caliber handgun with six live rounds. This was the gun that Hudson tossed under the car.

A jury could have viewed Defendant and Hudson, being out and about at a rather peculiar hour, dressed in dark clothes, and carrying guns, as being up to no good. In fact, the jury could very well have viewed them essentially as partners in crime. As such, an astute defense counsel could have reasonably assumed that the jury would view with suspicion, if not totally disregard, testimony by Defendant's partner in crime exonerating Defendant of the murder charge. In fact, at the evidentiary hearing, Hudson told a silly story about how he did not even see Defendant throw any weapon, in a feeble attempt to show that he would not have testified that Defendant was even in possession of the murder weapon, even though Sgt. Bucy testified that Defendant and Hudson both walked between two cars, and then Defendant dropped his gun and kicked it under a car, after which Hudson did likewise, kicking his weapon under the same car, leaving little doubt that Hudson would have seen Defendant kick the weapon under the car.⁵

2) The Prejudice Prong

Of course, where there has been a failure to investigate that does violate the deficient performance prong, there must still be a showing of prejudice before a court can conclude that

⁵ The Court of Appeals made essentially the same observation, although it appeared in the prejudice part of their analysis, "As a whole, Hudson presented himself at the *Ginther* hearing as a friend of defendant, who could not or would not implicate defendant in any crime." Court of Appeals Opinion, p 4.

counsel's performance resulted in ineffective assistance of counsel warranting a new trial. A defendant must "affirmatively prove prejudice" to meet the second prong of an ineffective assistance of counsel claim. *Strickland, supra*, 466 US at 693; 104 S Ct at 2067. And a court may resolve a claim of ineffective assistance of counsel based solely on lack of prejudice without considering the reasonableness of the attorney's performance.⁶

With respect to the "prejudice" prong, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding below would have been different." *Strickland, supra*, 466 US at 694; 104 S Ct at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," as "[v]irtually every act or omission of counsel would meet that test, and not every

⁶ Indeed, *Strickland* states:

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

466 US at 697; 104 S Ct at 2069.

error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” *Id.*, 466 US at 693; 104 S Ct at 2067. In *Harrington v Richter*, 562 US 86, 131 S Ct 770; 178 L Ed 2d 624 (2011), the Supreme Court elaborated on the standard that defendants must meet to prove prejudice under *Strickland*'s second prong:

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is reasonably likely the result would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

562 US at 111-112; 131 S Ct at 791-792.

See also *Cullen v Pinholster*, 563 US 170, 189; 131 S Ct 1388, 1403; 179 L Ed 2d 557 (2011) (“ ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ That requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” (citation omitted) (quoting *Richter*, *supra*)).

The People are in full agreement with the Court of Appeals’ analysis as to the prejudice prong. In its Opinion, the Court of Appeals found as follows:

Defendant also failed to meet his burden of showing prejudice. Although the trial court did not directly resolve this

issue, it identified several factors that bear on the issue. As the trial court observed, Hudson's proposed testimony would have corroborated McDuffie's testimony that he, defendant, and Hudson knew each other. It also would have accentuated that guns were discarded by both Hudson and defendant on October 18, 2008, one of which was the murder weapon. [Footnote omitted].

And just as Hudson denied being present during the shooting in his testimony at the *Ginther* hearing, he also denied any knowledge of the Glock handgun seized by the police on October 18, 2008, that was connected to the shooting. Hudson testified that he threw a .38 caliber gun and did not see defendant throw anything. Indeed, Hudson denied that he was walking with defendant when the police arrived, which was contrary to the officer's testimony that he observed both Hudson and defendant step between two cars, and then separate after the two guns were dropped. As a whole, Hudson presented himself at the *Ginther* hearing as a friend of defendant, who could not or would not implicate defendant in any crime. And, if Hudson had testified, the accomplice instruction that the trial court gave in relation to McDuffie's testimony would have similarly guided the jury's evaluation of Hudson's credibility.

In addition, Hudson had theft-related prior convictions that likely would have been admissible for impeachment under MRE 609.⁷ The record also discloses that there was some circumstantial corroboration for McDuffie's identification of defendant as the shooter, beyond the evidence connecting defendant to the murder weapon. Two individuals who were passengers in the Mountaineer when the shooting occurred gave descriptions of the shooter's height

⁷ Hudson had been previously convicted of five theft-related offenses (three counts of larceny from a motor vehicle, arising from an incident on October 18, 2005; one count of receiving and concealing stolen property, arising out of an incident on August 24, 2004; and another count of receiving and concealing stolen property, arising out of an incident on September 12, 2003), all of which he could have been impeached with under MRE 609. The trial court noted during argument following the evidentiary hearing in this case that Hudson did carry this baggage (of prior theft-related convictions) (Evidentiary Hearing Transcript, 02/24/15, 13). And while the investigator who was hired by Defendant's family, who interviewed Hudson, was unaware of Hudson's criminal record, and only learned of it on cross-examination by the prosecutor at the *Ginther* hearing, did not see Hudson's criminal record as having any real effect on Hudson's credibility, because, as the investigator said, everybody made mistakes, a jury hearing of Hudson's larcenous history would likely not have had the same cavalier view of Hudson's credibility.

and build, which were consistent with defendant.⁸ Assuming

⁸ The People acknowledge that their key witness, Sean McDuffie, did have credibility issues – for example, on direct examination, when asked by the prosecutor if he remembered being with Defendant and Hudson in the area of Kelly, Whittier, and Morang in the early morning hours in the summer of 2008, when Defendant shot somebody, McDuffie responded that he was not sure, and when asked by the prosecutor point blank if he was present when Defendant shot somebody in a new black truck, McDuffie responded in the negative, and it was only after being shown his statement to the police that McDuffie acknowledged that he did witness Defendant shoot a person in a new truck – but McDuffie’s testimony was corroborated by other evidence.

Camry Larry testified that the car that went by them the first time was dark colored. McDuffie testified that the car that he, Defendant, and Hudson were in was a dark-colored Malibu or Neon. Adam McGrier testified that the car that pulled up alongside of them looked like a black, four-door Lumina. The Chevy Lumina and the Chevy Malibu are similar-looking vehicles. Thus, McDuffie’s description of the vehicle that he was in was consistent with what the eyewitnesses said.

McDuffie testified that the gun that Defendant had was a Glock 9, which, according to McDuffie was the same gun that Defendant got locked up with. This was the type of gun that Defendant was caught with three months later, that is, a Glock 9 millimeter. Thus, McDuffie got the type of gun part right.

McDuffie testified that the victim was in a dark-colored truck. The victim was in a black Mountaineer. A Mountaineer is a small Mercury SUV, which is a truck-like vehicle. And McDuffie said that the victim’s vehicle was dark green. The victim’s vehicle was actually black, but black could be mistaken for dark green at night. Thus, McDuffie’s testimony about the victim’s vehicle was consistent with the facts.

McDuffie testified that there were four people in the victim’s vehicle, and that he saw the people get out of the vehicle and run. This testimony was consistent with the facts.

And there was other circumstantial evidence pointing to Defendant as the shooter.

Camry Larry described the shooter as being black, tall, and little, meaning thin. When Defendant was asked to stand up in court, Larry described Defendant as being tall, thin, and little.

Sgt. Bucy described Defendant, who he arrested on October 18, 2008, as being 6’1” and 170 lbs., which is essentially the description of a person who is tall and thin.

defense counsel failed to conduct a reasonable investigation regarding Hudson's value as a witness, defendant has failed to establish a reasonable probability that it affected the outcome of the trial. Because Hudson would have strengthened the prosecution's evidence linking defendant to the murder weapon, and Hudson had his own credibility issues, the absence of his proposed testimony does not undermine confidence in the verdict. Accordingly, defendant has not demonstrated the requisite prejudice to establish ineffective assistance of counsel.

Court of Appeals Opinion, pp 3-4.

Understanding that a lawyer's decision not to put a witness on the stand without interviewing the witness is not entitled to the same level of deference as where the lawyer has actually interviewed the witness before making his or her decision not to call the witness, the reason for this being that a lawyer who interviews a witness can rely on his or her assessment of their articulateness and demeanor – factors a reviewing court is not in a position to second-guess – it seems axiomatic still that had trial counsel interviewed Hudson, he would have been justified in making a decision not to call him, for the very reasons given by the Court of Appeals. Those reasons would have been Hudson's criminal history of larcenous offenses, and Hudson's presentation of himself at the *Ginther* hearing as Defendant's friend who would not implicate him in any crime.

3) The People's Answer to Defendant's Criticisms of the Lower Court Decisions

Defendant lodges a number of criticisms of the lower court decisions which the People will attempt to answer.

Adam McGrier testified that the shooter was around his height, which was 6'. Again, Sgt. Bucy testified that the Defendant was 6'1".

Defendant claims that the courts below (the trial court and the Court of Appeals) made an analytical error common to ineffective assistance of counsel cases, that is the use of hindsight to supply a tactical decision that trial counsel could have made, but did not.

The People respond that both the trial court and the Court of Appeals did what United States Supreme Court case law dictates. As the People noted in footnote 4, a court reviewing counsel's performance "is required not simply to "give [the] attorneys the benefit of the doubt," but to affirmatively entertain the range of possible "reasons counsel may have had for proceeding as they did." *Cullen v Pinholster*, *supra*, 563 US at 196; 131 S Ct at 1407, quoting from *Pinholster v Ayers*, 590 F3d 651, 692 (CA 9, 2009) (Kozinski, CJ, dissenting). *Strickland* does, after all, "call for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Cullen*, *supra*, 131 S Ct at 1407.

Defendant claims that the courts below committed another fundamental error by downplaying the prejudicial effect of trial counsel's deficient performance. As part of that argument, Defendant asserts that Defendant's possession of the murder weapon three months after the murder was not overwhelming evidence of his guilt to the extent that Hudson's testimony would not have made a different result probable. He argues that there was no independent evidence that Defendant had possessed the gun prior to or around the time of the murder, but rather street guns change hands.

The People counter that Defendant's possession of the murder weapon was very strong evidence pointing to him as the perpetrator. To say that Defendant got the gun from somebody else after the murder, as Defendant suggests, has no record support and, instead, is based on pure speculation. And while Defendant had every right not to testify at his trial, he could have

nevertheless taken the stand and explained where he got the weapon that turned out to be the murder weapon. See e.g. *People v Allen*, 351 Mich 535; 88 NW2d 422 (1958):

While the defendant charged with crime clearly never has to prove his innocence, there is manifestly a point in the trial of a case where if he is dissatisfied with the proofs made by the People on a given point, he can fairly be expected – at least before he will be heard to complain – to make some sort of rebuttal move in his own behalf.

351 Mich at 549.

Defendant states in his Application, p 26 as follows:

Notably, the Court of Appeals never directly addressed whether counsel's failure not to investigate was supported by "reasonable professional judgment." Rather, it deflects and turns the inquiry on Mr. Pippen, stating that there was "no testimony from either defendant or trial counsel at the *Ginther* hearing regarding what information, if any, defendant may have provided to counsel about the charges, or whether Hudson could provide defendant with a defense." Slip op at 3. It appears that the Court is suggesting without directly saying that Mr. Pippen may have disclosed to trial counsel that he or Hudson was present at this shooting. Had Mr. Pippen made an admission to his counsel that rendered investigation unnecessary, Mr. Glenn had every opportunity at the evidentiary hearing to say so.

The People do not read the Court of Appeals' Opinion in the same way that Defendant reads it. The Court of Appeals's Opinion states:

"Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information

supplied by the defendant.” *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Accordingly, “inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions.” *Id.* In this case, however, there was no testimony from either defendant or trial counsel at the *Ginther* hearing regarding what information, if any, defendant may have provided to counsel about the charges, or whether Hudson could provide defendant with a defense.

Court of Appeals’ Opinion, pp 2-3.

What the Court of Appeals was simply saying here was that this was not a case where there had been testimony about any conversation between Defendant and his trial counsel about the charges or about Hudson. The Court was not surmising or suggesting that such a conversation had occurred.

4) Conclusion

The grounds for granting an application for leave to appeal are set forth in MCR 7.302(B)(5):

(5) In an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals;

The Court of Appeals’ decision in this case does not conflict with a decision by this Court or another decision of the Court of Appeals. Thus, the only other basis for granting leave to appeal would be if the Court of Appeals’s decision in this case was clearly erroneous and would cause material injustice. The People submit that the Court of Appeals’ decision is simply not clearly erroneous.

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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